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SOME OF THE PROVISIONS OF THE ORIGINAL AND RECENT CONSTITUTIONS OF THE SEVERAL STATES, RELATING TO THE JUDICIARY.

The love of making, amending, or altering Constitutions has been frequently remarked upon as one of the peculiarities of the American people. The fact that they have this love cannot be denied, and that it is peculiar to them is equally true, for they have been and are the only people who have constitutions worth the name to make, amend or alter. The principle finds an early development, as the academical and college experience of each one will bear witness. The constitutions of college societies are generally changed by successive classes, or if the organic law remains undisturbed, the by-laws are sure of being altered. The same love and facility for change follows boys from school and college to their early manhood and through mature years. The free exercise of this right, the natural workings of this peculiarity result in this, that the form of government becomes adapted to the people, and not the people to the form of government. We propose to notice briefly, and in a very general manner, the provisions of the original constitutions of the several States, and the changes, alterations and amendments that have been made therein, or that have been adopted by the new States as they have been successively admitted into the Union, so far as such provisions relate to the judiciary or kindred subjects, and so far as they illustrate the general desire which a large majority of citizens of all shades of political, or party, or sec-

tarian feeling have, that certain powers shall be placed beyond the reach of hasty legislation, or popular clamor.

Vermont and the old thirteen States, with the exception of New-Hampshire, Rhode Island, and Connecticut, established for themselves constitutions between the time of the declaration of independence and the treaty of peace in 1783. The first constitution of New Hampshire was adopted in 1784. Connecticut continued under the charter granted by Charles II. in 1662, until 1818; and Rhode Island under the charter of 1663, granted by the same monarch, until 1842, in which years their present constitutions were respectively established. Originally in New Hampshire, Massachusetts, New York, Pennsylvania, Delaware, and Maryland, the judges of the higher Courts were appointed by the governor, to hold office during good behavior, and upon salaries which were not to be increased or diminished during their term of office. From the first, however, in Vermont, Rhode Island, Connecticut, New Jersey, Virginia, and the two Carolinas, the judges were elected either by joint or concurrent vote of the Legislature. In New Hampshire and Connecticut the tenure of office was during good behavior, or until seventy years of age; in new Jersey for seven years; in Vermont for one year; and in the other States during good behavior. In each of the States their salary could not be reduced during their term of office. In Rhode Island they held office during the pleasure of the grand committee, — *i. e.* both branches in convention.

Between the treaty of 1783 and the adoption of the constitution of the United States in 1788, there was no change except in Georgia, where a new constitution was adopted in 1785. Between the adoption of the constitution and 1800, there were several changes. Pennsylvania and South Carolina changed theirs in 1790; New Hampshire and Delaware in 1792; Vermont in 1793; and Georgia again in 1798. Kentucky formed her first constitution in 1790, and changed it in 1799; and Tennessee established hers in 1796. In Kentucky the judges were appointed by the governor; in Tennessee they were elected by the legislature. So far as it related to the judiciary, few alterations were made during this period in the constitutions of any of the States.

Between 1800 and 1820, no change was made in the constitution of any State except in that of Connecticut, where a constitution was formed in 1818. Ohio adopted her con-

stitution in 1802; Louisiana in 1812; Indiana in 1816; Mississippi in 1817; Illinois in 1818; Alabama and Maine in 1819; and Missouri in 1820.

In Ohio it was provided that the judges should be elected by joint ballot, and for seven years. In Louisiana, Alabama, Maine, and Missouri, they were appointed by the governor. Their tenure of office was during good behavior, with the limitation in Mississippi and Missouri to sixty-five years, and in Maine and Connecticut to seventy. It was provided in Alabama, that after 1833, the judges should be elected by joint ballot every six years. In Indiana, the judges of the Superior Court were appointed by the governor, the presidents of the Circuit Courts by the Legislature, and assistant judges elected by the people, all for the term of seven years. In Illinois, all judges were elected by the Legislature, and held office during good behavior.

Between 1820 and 1830, no changes were made except in Massachusetts and New York. Each of these States amended its constitution in 1821, but no change was made in relation to the appointment of judges or their tenure of office.

Between 1830 and 1840, three new States were admitted, Michigan in 1835, Arkansas in 1836, and Florida in 1839, and five of the States amended their constitutions, — Mississippi in 1832, Tennessee in 1834, North Carolina in 1835, and Pennsylvania and Delaware in 1838. In Pennsylvania, Delaware, North Carolina, and Tennessee, the same provisions with regard to the appointment of judges and their term of office were retained. In Mississippi, for the first time in the States, all the judges were elected by the people. The chancellor was chosen by the people at large, and for six years; the judges of the Court of Errors and Appeals in districts and for the same term. But even in Mississippi the provision was retained, that the salaries of the judges should not be diminished during their term of office.

In Michigan the judges of the Superior Courts were appointed by the governor for seven years, and those of the inferior Courts and justices of the peace were elected by the people for four years. Within a year or two, by an amendment of the constitution, all judges and judicial officers are elected by the people. In Arkansas the judges are elected by the Legislature, those of the Supreme Court for eight years, and those of the Circuit Court for four

years. In Florida the judges are elected by the Legislature, at first for five years, and afterwards during good behavior.

Between 1840 and 1850, four new States were admitted into the Union, — Texas in 1845, Iowa in 1846, Wisconsin in 1848, and California in 1850. During the same period six States adopted new constitutions, — Rhode Island in 1842, New Jersey in 1844, Louisiana in 1845, New York in 1846, Illinois in 1848, and Kentucky in 1850. In Texas judges are appointed by the governor for six years. In Iowa judges of the Supreme Court are elected by the Legislature for six years; those of the District and Inferior Courts are elected by the people for five years. In Wisconsin and California all judicial officers, and all officers of the Courts, are elected by the people, the judges of the Superior Courts for six years, judges of other Courts and officers of the Courts for a shorter time. In Rhode Island no change was made in the mode of electing judges, or in their tenure of office.

In New Jersey the chancellor and justices of the Supreme Court are appointed by the governor for six years, those of the Court of Common Pleas are chosen by the Legislature for five years, and justices of the peace are elected by the people for five years. In Louisiana the judges are still appointed by the governor for eight years. A proposed amendment to the constitution is now before the people of that State, making all judges and judicial officers to be elected by the people. In New York the most radical changes have been made. All judges and judicial officers, and all officers of the Courts, are elected by the people, either at large or in judicial districts, for various terms of office, none longer than eight years. The terms of office of the judges of the Supreme Court were at first so arranged, that one would go out of office and one be elected every two years. Illinois and Kentucky have followed the example of New York, and framed their constitutions on the same model. All judges and judicial officers, and all officers of the Courts are elected by the people, for short terms of office, not exceeding eight years.

Since 1850, Indiana, Ohio, Maryland, and Virginia, have adopted new constitutions, each and all, so far as relates to judicial matters, of the New York model. All judges and judicial officers and officers of the Court, except the clerk of the Court of Appeals in Maryland, who is appointed by

the Court, and justices of the peace, are elected by the people. The judges of the highest Court are chosen in Virginia for twelve years, in Maryland for ten years, in Indiana for six years, in Ohio for five years. The judges of the inferior Courts in each of these States are elected for shorter periods. The judges, after the first election, are classified in such a manner, that the term of office of each expires on different years, when a new election is held of a judge to hold office for the full term. Missouri and Georgia have so far modified their constitutions, that judges are now elected by the people.

A convention to amend the constitution of New Hampshire was held in 1850, called in pursuance of the provisions of the existing constitution. Radical changes were voted by the convention, affecting almost all departments of the government, but when submitted to the people for ratification, they were all rejected by large majorities. It is believed that this is the only instance on record, in which the matured deliberations of a constitutional convention, called by the deliberate expression of the popular will, have been rejected by the people. Some of the amendments proposed by the convention, as to the abolition of religious tests and property qualifications, &c. have been ratified by the people the present year, but the judiciary system is unaltered.

The people of Massachusetts in November, 1851, by a popular vote, refused to call a convention to amend their State Constitution. Projects for calling conventions for similar purposes are now, or have recently been, entertained by the Legislatures of Delaware, California, and Massachusetts.

It will be seen by the above very brief sketch, that in six States, judges are still appointed by the governors with the advice and consent of their Council, or the Senate, as the case may be; that in ten States they are elected by the Legislature, and that in fifteen States they are chosen by the people. In a large majority of the States, therefore, they are elected either by the people, or by their representatives assembled in the Legislature. Since Mississippi set the example in 1832, the tendency of things has been to popular elections. In those States where the judges were elected by the Legislature, that feature has been retained, but it has not been adopted in other States. The long stride has been taken at once from executive appointments to popular

elections. Since the great States of the Union have followed the example of Mississippi, the probabilities are that in all subsequent revisions of the constitutions of those States where judges are appointed by the executive, this change and this mode of electing judges will be adopted. There are the most weighty theoretical objections to the change, and it is to be hoped that those States who follow the course which experience has shown to be both safe and wise, will not depart therefrom until as full and fair trial of the system of the election of judges by the people, for a series of years and through successive elections, shall have demonstrated that the best and soundest lawyers are made judges, and that the judges preserve their judicial integrity, and decide the cases brought before them according to the law as it is, and without reference to the effect of their decision in cases of great interest or excitement upon the next election of judges. The only provision of the early constitutions, with regard to the election or appointment of judges which is now retained in all the constitutions, is, that the salaries of the judges shall not be diminished or changed during their term of office.

In following along the changes of the constitutions of the various States, mention has been made and notice given only of alterations so far as the judiciary and judicial officers are concerned. There is room only to refer to other changes, and to provisions which have been inserted into the constitutions of many of the States, which previously had been matter of statute regulation. In almost every instance, it will be perceived that the change has been made in consequence of the point having at some time in some State been the subject of discussion and controversy, either in the Courts, or on the popular arena, or both. In all States, except South Carolina, the property qualification is abolished. In all the constitutions established since 1820, the provision has been inserted, that in indictments for libel, the truth shall be given in evidence, and in most of them, that in such cases the jury shall be judges both of the law and the fact. In States where duelling was tolerated, the being in any way concerned in a duel is a disqualification from holding office, either during life, or for a shorter period. The prohibition of imprisonment for debt, except in cases of fraud, is part of most of the recent constitutions, — and in that of Wisconsin and others, the homestead exemption has crept in. In California, the

right of the wife to her separate property, free from the control of the husband or his creditors, is made part of the organic law. Since 1830, not infrequently the hostility to or fear of corporations, particularly of banking corporations, has caused the insertion of a prohibition against granting a charter to any corporations. Perhaps greater care is taken, since 1840, to restrict the State from borrowing money and incurring debts than for any thing else. The terrible lesson taught many of the States by their lavish expenditures of previous years, and the revulsion of 1836 and '37, and the darker stain of repudiation, which, to the honor of the American name, no State dare now openly and unblushingly avow, has made this an object of primary and strictest care. The same fear, and perhaps the question of general politics, have caused internal improvements in some States to be forbidden in their constitution. The several questions as to lotteries, the veto power, importation or emancipation of slaves, keeping negroes and mulattoes out of the State, the restraint upon the pardoning power, the privileges or disabilities of aliens, the political disabilities of clergymen, the ineligibility of bank officers to any political office, have in the constitutions of some of the States all found a place. And while these frequent changes have been made, it is singular and at the same time satisfactory to perceive what care is taken to guard against future hasty and ill-considered attempts to change, or amend the constitution. In most of the States it now requires a vote of more than a majority of both branches of the Legislature, or of all those elected to the Legislature, then a publication of reference to the people, a favorable vote by them at an election called solely for that express purpose, and then a majority, or greater vote, in another Legislature. With these safeguards, and with constitutional provisions, covering almost every conceivable ground of legislation, there need be but little fear of improper legislation, so long as judges impartially, without fear or favor, shall decide upon the question of the constitutionality of the laws.

By the last Constitution of New York, provision was made for establishing tribunals of conciliation, whose judgments are to be binding only upon parties who voluntarily submit their matters in dispute, and agree to abide the result. This provision has been generally adopted in the constitutions that have been since formed. We have not yet heard that any such tribunals are in existence.

The recent constitutions of the several States also provide for the appointment by the Legislature of Commissioners in the respective States to amend and simplify judicial proceedings, and to codify the law both civil and criminal. In some constitutions, as in that of Ohio, the further direction is given, "so far as is practical and expedient to abolish distinct forms of action, and the difference between law and equity." The right to take private property for public uses has this condition, that compensation therefor shall be first made in money, the amount to be assessed by a jury, without deduction for benefits to any property of the owners. In Maryland and Indiana the power of juries in criminal cases is thus defined: "In all criminal cases the jury shall be judges of the law as well as of the facts." The constitution of the former State provides that "No law shall be passed creating the office of attorney-general," and it abolishes the Court of Chancery after the fourth of July, 1853, and that of the latter State declares that the assembly "may modify or abolish the grand jury system;" and "that any voter of good moral character may be admitted to practise law in all the Courts of the State." Some of the other new and most general provisions, in regard to laws, are, that they must be passed by a majority of all the members elected to the Legislature, and that on their final passage the ayes and noes must be recorded.

Recent American Decisions.

Supreme Judicial Court of Maine, Piscataquis, 1850.

MOORE AND WIFE *v.* INHABITANTS OF ABBOT.[1]

To maintain a suit against a town for the recovery of damage, sustained through a defect in its highway, it must be proved, that the highway was not safe and convenient; that the plaintiff exercised ordinary prudence and care; and that the injury was occasioned by the defect in the highway alone.

In such a suit, if it appear that the injury was occasioned jointly by a defect in the highway and a delinquency in the plaintiff's horse, carriage, or harness, rendering the same unsafe or unsuitable, the plaintiff cannot recover, although he had no knowledge of such deficiency, and was in no fault for the want of such knowledge.

When an injury is occasioned by the united effect of a defect in the way,

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[1] This case will be reported in 32 Maine R. 46.

and some other cause, the party, bound to keep the road in repair, is not liable.

In order to a recovery, it must be proved that the injury was occasioned solely by the neglect of the defendants, and not by the neglect of the town combined with another cause, for which they were not responsible.

An injury cannot be held to have been caused by a defect in the highway, when some other cause contributed to it.

Case, for an injury sustained by the female plaintiff, through a defect in the highway of the defendant town. She was riding on the highway in a wagon.

Evidence was introduced to the jury by the respective parties, as to the existenee of the defect, the happening of the injury by the means of it, and as to the care and prudence used by the plaintiffs. Some evidence tended to show the breaking of a ring in the harness, at or just prior to the accident.

Among other legal positions, Shepley, C. J. presiding, instructed the jury, that they should be satisfied, before they could find a verdict for the plaintiffs, that the highway or bridge was not at the time safe and convenient; that, if satisfied there was such a defect, they should also be satisfied that the plaintiffs exercised ordinary care, in providing the horse, wagon and harness, and in the management of the horse; that the accident occurred, and the injury was occasioned by the defect in the way or bridge alone, and not by the joint effect of the defect in the way and defect in the harness and wagon, or either of them; that if they should be satisfied the accident happened by the joint effect of a defect in the wagon and a defect in the harness, rendering it unsuitable or unsafe, although such defect in the harness was not known, and the plaintiffs were not in fault for want of knowledge, the plaintiffs would not be entitled to recover. To these instructions the plaintiffs excepted.

J. Appleton, for the plaintiffs.

The second instruction required ordinary care on the part of the plaintiffs. The law recognises a distinction between ordinary care, a slight degree of care, and a high degree of care, and correlative degrees of neglect. Ordinary care is not inconsistent with the slightest degree of neglect. They may co-exist. Extraordinary care, *summa diligentia*, is not required. If ordinary care has been used, though in connection with slight neglect, the plaintiffs are entitled to recover. Travellers have a right to consider the road in good repair, and to drive accordingly. "They are not required to be constantly on the lookout for difficulties, which

they have a right to presume will not occur." *Thompson* v. *Bridgewater*, (7 Pick. 188.) Negligence, then, to deprive the plaintiff of his right of action, in all cases means "want of ordinary care." Consequently, extraordinary diligence, *exactissima diligentia*, is no where required, nor does the plaintiff fail, though guilty of a very slight fault or neglect, *levissima culpa*. If the law be not thus, then are ordinary care and extraordinary care the same.

The third instruction to the jury was that, before they could find a verdict for the plaintiffs, they must be satisfied that the accident happened, and the injury was occasioned by the defect in the way alone, and not by the joint effect of the defect in the way and a defect in the harness and wagon, or either of them.

We respectfully submit, that this instruction was erroneous.

The statute gives the right of action for an injury "through any defect or want of repair." To that statute, the Judge added the word, "alone." This is a word of great intensity; it excludes all other co-operating causes, even an accident, or the slightest possible degree of negligence, although ordinary care was used. But the law is otherwise. (41 E. C. L. R. 422; 31 E. C. L. R. 536.)

The great question is, What was the efficient cause, the *causa causans*, of the injury? If the plaintiff, over a good road, might have proceeded with safety, driving precisely as she drove over this road, is it not manifest that the defect in the road was the cause? If there was care enough for a good road, surely the injury was caused by the defect. (18 Maine, 286.) If both causes, the defect in the road and that in the harness, combined to produce the injury, it would not have occurred, except for the defect in the road. The state of the harness did not affect the state of the road; the state of the road affected the harness.

The fourth instruction was, that if the accident happened by the joint effect of a defect in the way and a defect in the harness, rendering it unsuitable or unsafe, although such defect was not known, and though the plaintiffs were in no fault for want of knowledge, they would not be entitled to recover.

This instruction requires not merely ordinary, but extraordinary diligence. It exonerates the town from liability, although the road be ever so bad, and that while the plaintiff is entirely without fault.

The preceding instruction required ordinary care; this requires extraordinary care, nay more, it makes the plaintiff insurer, not against good roads, but against the worst possible roads. It annihilates the rule of ordinary care.

The plaintiff, according to this instruction, might have had a harness, defective, it may be, but amply sufficient for a good road, yet the instruction is peremptory, that if it was not sufficiently strong to stand the worst defects, he must fail.

The instruction itself presupposes there was ordinary care, which is all that the law requires, and it precludes a plaintiff from ever recovering, though no omission or act of commission, for which, on any principle of law, he is responsible, contributed to the injury.

The Vermont statute is like ours; its words are, "By means of any insufficiency or want of repair." (Verm. Stat. 432, sect. 13.) Under that statute, the decisions of that State are essentially at variance with the rulings in this case. (9 Verm. 411; 16 Ib. 231; 15 Ib. 711.)

One of the very objects of safe and convenient roads is the protection of travellers, and to lessen the dangers resulting from fright, and from accidental causes; but if this be the law, what protection does the statute afford? When its need is greatest, its protection ceases.

S. H. Blake, for the defendants.

Shepley, C. J.—The female plaintiff received a bodily injury while travelling on the highway, which the defendants were by law obliged to make safe and convenient. The statute (c. 25, § 89,) provides, if any person shall receive any bodily injury, "through any defect or want of repair" of such way, he may recover "the amount of damage sustained thereby."

Persons may be injured while travelling on the highways without being blameworthy, and without the fault of those who are required to make the ways safe and convenient, or of others. In such cases the risk is their own. They must bear their own misfortunes. They cannot call upon others as insurers of their safety.

They may also suffer injury, while travelling upon highways, which are not safe and convenient, and the injury may not be occasioned by the want of repair, or by their own want of ordinary care to avoid it. In such case it would be quite clear, that they could not recover damages of those who were in fault, by neglecting to keep the way

safe and convenient. The statute was not designed to relieve them from damages thus occasioned, by making those responsible, whose duty it was to have repaired the ways.

An injury may also be occasioned by the united effect of a defect in the way and of some other cause, and in such case the party injured cannot recover of those whose duty it was to keep the way in repair, because he does not prove, that the injury was occasioned through or by reason of such want of repair. To enable him to recover, he should prove that the injury was thus occasioned, that is, that it was entirely occasioned through such want of repair; for the statute was not intended to impose upon towns the burden of making compensation for injuries not occasioned by their own neglect of duty; was not intended to make them assume any portion of the risk of travelling not occasioned by their neglect. An injury cannot be determined to have been occasioned by a defect in the way, so long as it remains certain that some other cause contributed to produce that injury. Such is the law, when the injury is alleged to have been occasioned by the negligence of another person. And numerous cases show, that the same rule is applicable, when the action is brought against a town to recover damages for an injury occasioned by a defect in a highway.

In the case of *Knapp* v. *Salisbury*, (2 Camp. 500,) Lord Ellenborough instructed the jury, "If what has happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable."

In the case of *Plushwell* v. *Wilson*, (5 C. & P. 375,) the jury were instructed, "That if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."

In the case of *Williams* v. *Holland*, (6 C. & P.) the jury were instructed, "If the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff."

In the case of *Lynch* v. *Nurdin*, (1 Ad. & El. N. S. 30,) the servant of the defendant had left his horse and cart in the street unattended for half an hour. The plaintiff, a boy under seven years of age, got upon it, and while he was getting off the shaft, another boy started the horse, and the plaintiff fell, the wheel passed over and broke his leg. Lord Denman, in delivering the opinion, makes a remark, which

if alone considered would lead to a different conclusion, but when considered in connection with the instruction to the jury, and their finding, and with other remarks in the same opinion, can be regarded only as an *obiter dictum*. While commenting upon the case of *Bird* v. *Holbrook*, (4 Bing. 628,) he observes, "And so far is his lordship from avowing the doctrine, that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott* v. *Wilkes*, (3 B. & Ald. 304,) an authority in favor of the action." If this were to be considered as presenting the law of that case, it would be opposed to the whole current of authority in that country and in this, that when the injury is occasioned by the negligence of the defendant and the want of ordinary care on the part of the plaintiff, he will not be entitled to recover.

But such does not appear to have been the law of that case as held by the presiding Judge or by the Court in bank. Mr. Justice Williams left it to the jury to decide, "whether that negligence occasioned the accident." And Lord Denman in his opinion, while speaking of defendant's servant, says, "He has been the real and only cause of the mischief;" and says, "it was properly left to the jury."

In the case of *Bird* v. *Holbrook*, referred to by his lordship, the defendant had set a spring-gun in his garden; the plaintiff passed over the garden wall without license to get a fowl, that had strayed, without knowing that a spring-gun was there, and stepped upon the wire attached to it, by which the gun was discharged and the injury occasioned. The only blame imputed to the plaintiff was, that he went into the garden without leave. It was not pretended, that such unlawful act contributed to discharge the gun. He does not appear to have been charged with negligence in stepping upon the wire.

Is the reason for the rule so thoroughly established, that the plaintiff cannot recover when the injury was occasioned by the neglect of the defendant, and by his own want of ordinary care, that he is estopped by his want of ordinary care? By no means; for then he could not recover, if he was not in the exercise of ordinary care, although it did not in any degree contribute to cause the injury. The rule deducible from the decided cases is stated in the case of *Kennard* v. *Burton*, (25 Maine, 39): "If the party, by the want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exer-

cise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover." The last position is correct, because, in such case, the sole cause of the injury is imputable to another, who cannot complain of the negligence of the plaintiff, which occasioned no injury, produced no effect.

And for the like reason, if the sole cause of the injury was not imputable to another, the plaintiff would not be entitled to recover, although it might not be imputable to his own negligence, but to "inevitable accident."

In the case of *Smith* v. *Smith*, (2 Pick. 621,) Parker, C. J., gives the true reason, why one not in the exercise of ordinary care, cannot recover against one guilty of negligence; he says, "And where he has been careless, it cannot be known, whether the injury is wholly imputable to the obstruction, or to the party complaining."

The conclusion cannot therefore be avoided, that the plaintiff must prove, that the injury was occasioned by the default of the defendant alone, and not by that default and some other cause, for which the defendant is not responsible, without a disregard of the whole class of cases, which decide that the plaintiff cannot recover, when the injury is occasioned by the default of the plaintiff, and of defendant.

The doctrine, that the plaintiff can only recover when the injury complained of did not happen by inevitable accident, or by the want of ordinary care on the part of the plaintiff, or by a combination of these with the want of repair of a highway, appears to be the only one consistent with sound reasoning, and to have been generally received and acted upon. It is difficult to perceive how any other doctrine can be received, without producing the effect to make towns liable to pay damages for injuries not proved to have been occasioned by their neglect. No proof can establish that fact, so long as it appears that some other cause contributed to produce the result. It was accordingly decided in *Libby* v. *Greenbush*, (20 Maine, 47,) that "the plaintiff had not fully established his right to recover, so long as this question was left in doubt."

The necessity, that the injury should be proved to have been occasioned by the neglect of the defendants alone, and not by that combined with another cause, for which the defendants were not reponsible, has been the more carefully considered, because it would appear from the cases cited by the counsel for the plaintiffs, that a different rule has re-

ceived the approbation of a Court entitled to such high respect and approbation as the Court of Vermont.

In the case of *Adams* v. *Carlisle*, (21 Pick. 146,) it is said, that two things must concur, first, that the highway was out of repair, and secondly, that the party complaining was driving with ordinary care and skill. It is obvious that another element of proof, not then requiring the consideration of the Court, was necessary; proof that the injury was occasioned by a want of repair of the highway.

The cases of *Bird* v. *Hoolbrook*, and *Lynch* v. *Nurdin*, decide no more than the admitted doctrine, that a plaintiff, who has been in fault or negligent, may recover, when such fault or negligence has not contributed to occasion the injury.

If the jury had found in this case, that the highway was not safe and convenient, that the injury was not occasioned solely thereby, but by that and defects in the wagon and harness, which rendered them unsuitable and unsafe, without blame being imputable therefor to the plaintiffs, and the case had upon such finding been submitted to the Court, to render judgment according to the rights of the parties, the accuracy of the instructions would be tested by the judgment to be rendered. And it could not be entered against the defendants without making them responsible for an injury partly occasioned by an unavoidable accident, and partly by their neglect. And such a judgment would make the town, when its ways were not in repair, an insurer against injuries not occasioned by its own negligence, but partly by inevitable accident.

It is alleged in argument, that the instructions made the plaintiffs responsible for the exercise of more than ordinary care; that the utmost caution and watchfulness was required. The fallacy of the argument consists in the omission to distinguish between the liability of the plaintiffs to suffer from inevitable accidents, or such as were occasioned without their own fault, and not wholly by the faults of the defendants, for which they can recover no compensation, although in the exercise of the utmost possible care; and those accidents which are occasioned by the fault of the defendants alone, for which they may recover, unless their own want of ordinary care contributed to produce the injury. The instructions required of the plaintiffs, the exercise of ordinary care only, while they protected the defendants from the payment of damages, occasioned by a combination

of causes, for some of which they were not responsible. They held the plaintiffs liable to suffer, without obtaining compensation for damages occasioned by inevitable accident arising from defects in the harness and wagon, or by such defects contributing in combination with defects in the highway to their injury.

The whole merits of the case, and the accuracy of the instructions depend upon the decision of the question, whether the defendants are liable to make compensation for an injury occasioned not alone by a defect in the highway, but by such defect and other causes, for which they are not responsible; and that question has not only been already decided in this State, but the principle upon which all the cases rest, that determine, that a plaintiff cannot recover, when the injury has been occasioned partly by his own negligence, and partly by the negligence of the defendant, forbids any change of that decision.

Exceptions overruled.

Supreme Judicial Court of Massachusetts, Opinion delivered March Term, 1852.

WARREN MARSH ET AL. *v.* FREDERICK BILLINGS ET AL.

M., a hack driver, agreed with S., the proprietor of the Revere House, to keep at a railroad depot good carriages, &c., on the arrival of certain specified trains, to carry passengers to the Revere House, and in consideration therefor S. agreed that M. should carry all the passengers from the Revere House to these trains, and should have the privilege of putting on his coaches and the caps of the drivers, as a badge, the words "Revere House." A similar agreement had existed between S. and B., and had been terminated, but B. still continued to use the words "Revere House" as a badge on his coaches and on the caps of his drivers, although requested not to do so by S., and endeavored to divert, and did divert, passengers from M.'s coaches into his own. In an action of tort by M. against B., for using said badge and diverting passengers; *held*, that M., by his agreement with S., had an exclusive right to use the badge as indicating that he had the patronage of the Revere House for the conveyance of passengers, and that if B., by using the badge, had falsely held himself out as having the confidence and patronage of that House, an action would lie against him therefor, without proof of specific damage, and such damages might be given as the jury should think were warranted from the whole evidence in the case.

THE facts in the case sufficiently appear in the opinion of the Court, which was delivered by FLETCHER, J. — This is an action on the case sounding in tort. It appeared by the evidence that Mr. Stevens, the lessee of the Revere House, on the first day of May, 1849, made a verbal agreement with the plaintiffs, by which they agreed

to keep coaches at the depot of the Boston and Worcester Railroad in Boston, to convey passengers arriving at said depot by the long trains, who might desire to go to the Revere House, for which purpose the plaintiffs further agreed to keep good horses and coaches, and employ first-rate drivers, to do the work of conveying passengers to the acceptance of said passengers and said Stevens; in consideration of which, the said Stevens agreed to employ the plaintiffs to convey all passengers who might wish to go from the Revere House to the said depot, and authorized the plaintiffs to put upon their coaches and on the caps of their drivers, as a badge, the words "Revere House."

It further appeared, that previous to said first day of May, when the said agreement was made with the plaintiffs, a similar agreement had existed between said Stevens and the defendants from the time he first opened the Revere House, and which was terminated by him with the agent of the defendants on said first day of May, because said defendants did not do the work to his satisfaction, and that said defendants under said agreement had placed the words "Revere House" on their coaches and on the caps of their drivers. It further appeared, that after the first day of May, 1849, and during the times alleged in the plaintiffs' writ, the defendants continued to carry the words "Revere House" on their coaches and on the caps of their drivers; that these coaches and drivers so marked were kept at the depot of the Boston and Worcester Railroad, and on the arrival of the long trains, their drivers were in the constant habit of calling out "Revere House" in loud tones, in the presence and hearing of passengers by said long trains.

It further appeared, that some time in July the said Stevens requested one of the defendants to discontinue the use of the words "Revere House" on their coaches and on the caps of their drivers; that he refused so to do, saying he had a right to use them. There was also evidence tending to show, that, in addition to using the words "Revere House" on their coaches and on the caps of their drivers, the defendants, by their agents, on one or more occasions, stated to persons desiring conveyance to the Revere House, that they were the agents employed by the Revere House, or said Stevens, to convey passengers, and that the plaintiffs were not, or words to that effect, by means of which statements some passengers were diverted

from the carriages of the plaintiffs and induced to go in the coaches of the defendants. Upon this point, however, the evidence was contradictory. One witness, employed by the defendants, but called by the plaintiffs as a witness, testified that on one occasion he induced three persons to leave the coach of the plaintiffs and go in the defendants' coach, by stating that his coach was the regular one, and that they had got into the wrong coach. The plaintiffs also offered evidence, tending to show that the defendants, during the time alleged in the plaintiffs' writ, carried large numbers of passengers from said depot to the Revere House.

The plaintiffs claimed that they had, on the evidence aforesaid, an exclusive right to the use of the words "Revere House" on their coaches and on the caps of their drivers; that these words were, in the nature of trade-marks, and that their action would lie, by showing that the defendants had used said marks in the manner aforesaid. It is not necessary to state particularly the instructions given by the Court to the jury, but upon these instructions the jury returned a verdict for the plaintiffs for seventy-five cents damages, and the case comes before this Court upon exceptions taken by the plaintiffs to the instructions to the jury.

The principle involved in the merits of this case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle, which has been repeatedly recognised and acted on by Courts in reference to the fraudulent use of trade-marks, and is regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city, have a knowledge of the reputation and character of the principal hotels, and could at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out, falsely, as being in the employment, or as having the patronage and countenance of the keepers of well known and respectable public

houses. It was said in behalf of the defendants, that the proprietor of the Revere House had no exclusive right to convey passengers from the Worcester Railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words "Revere House," and could convey no such exclusive right to the plaintiffs; that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester Railroad to any public house; and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of this case. The plaintiffs do not claim the exclusive right of using the words "Revere House," but they do claim the exclusive right to use them in a manner to indicate, and for the purpose of indicating the fact, that they have the patronage and countenance of the proprietors of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment, because the evidence shows that such was the fact, and that the plaintiffs and they alone had such patronage of that house by a fair and express agreement with the proprietor. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the depot to the Revere House. And they might perhaps use the words "Revere House," provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fairly open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words "Revere House" on the coaches and on the caps of their drivers, merely, but that they had falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the proprietor of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words "Revere House," not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case the jury should have been instructed, that if they were satisfied by the evidence that the plaintiff had made the agreement with the proprietor of the Revere House as stated, they had under, and by virtue of that agreement, an exclusive right to use the words "Revere House," for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words in the manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having the patronage and confidence of that house; and in that way to induce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights, for which the action would lie without proof of actual, specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers, as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants, but that the jury would be justified in making such inferences as to the loss of passengers and injury sustained by the plaintiffs, as they might think was warranted by the whole evidence in the case.

Though the instructions as given, may have been intended to conform substantially to these views, yet upon the whole, it seems to the Court, that the principles of the law, upon which the rights of the parties were to be deter-

mined, were not stated with all that distinctness and accuracy, which the practical importance of the case required.

The principles of law contained in this decision are so fully settled by numerous decisions, that it seems unnecessary to go into any particular examination of authorities, but it is sufficient to refer to some leading cases. *Coates* v. *Holbrook*, (2 Sandford, 586); *Blofield* v. *Payne*, (4 Barn. & Ad. 410); *Morison* v. *Salmon*, (2 Man. & Grang. 385); *Rowel* v. *Morgan*, (2 Keen, 213); *Croft* v. *Day*, (7 Beavan, 84); *Rodgers* v. *Nowell*, (5 Man. Grang. & Scott, 109); *Ball* v. *Locke*, (8 Paige, 75); *Stone* v. *Carlan*, (13 Law Rep. 360.)

New trial ordered.

William Sohier, for the plaintiffs. *William Brigham*, for the defendants.

Circuit Court of the United States, Eastern District of Pennsylvania, October Term, 1850.

VANTINE ET AL. *v.* THE LAKE.[1]

A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other, for all injuries resulting from her proximity, which human skill or precaution could have guarded against.

The schooner L., on entering a dock at high tide, was directed by her consignees to be moored to an adjoining wharf of which they were lessees, outside of the M. J., a smaller vessel. There was not in the dock during part of the ebb, enough water for the L., though there was sufficient for the M. J.; of which fact the consignees, but not the master of the L., were aware. No objection was made at the time from the M. J., nor any caution given. On the tide receding, the L., on this account, and from the bottom of the dock being banked up in the middle from accidental causes, (with which the consignees were also acquainted,) careened over on the M. J., crushing her timbers, and causing her to fill and sink. As soon as the danger was perceived, a measure of prevention was suggested by the M. J., but rejected as useless. *Held*, that the L. was bound to know the depth of water in the dock, or at any rate was responsible for the directions of the consignees, who had full knowledge; and that she had not taken proper precaution before or after the injury. The L. condemned in damages.

Besides the costs of repairs in this case, charges for wharfage while repairing; for the time of one of the owners, and of the crew in raising and clearing out the injured vessel; and for the loss of profits to the vessel while sunk, and during the time she was being repaired, allowed by the Court in the assessment of damages.

THE libellants were owners of a small schooner called the Mary Jane, of the burthen of twenty-seven tons, which arrived at Philadelphia on the 7th of December, 1849, with a cargo of oysters, and was fastened to the north side of a

[1] From the Legal Intelligencer.

wharf on the Delaware river, near Spruce street. On the tenth of the same month, while she was discharging her cargo, the respondent's vessel, the Lake, a schooner of about one hundred and twenty-five tons burthen, was hauled into the same dock, and placed outside the Mary Jane, and fastened to the same wharf. The south side of the dock was occupied by a brig, distant some ten feet from the Lake. The Lake came into the dock with the high tide, when the water was amply sufficient, but on the ebb, there being not enough water to keep her afloat, she settled in the mud, and careened over. As the tide receded, the Lake being the larger vessel, and fastened to the same wharf with the Mary Jane, held her suspended between herself and the wharf, till the timbers of the Mary Jane were crushed in, when she filled and sunk to the bottom; from whence she was raised at considerable expense and loss.

The respondents in their answer alleged in defence, that the Lake took her position in her berth by the orders of her consignees, who were the lessees of the wharf, with the precautions usual in such cases; that the libellants took no exception to the manner of fastening the Lake, and gave them no caution or warning, whereby her master could know that for about five hours of every tide she would be aground, by reason of the shallowness of the dock; and that her master was altogether ignorant of the state of the wharf, and reasonably presumed from the orders he received from the consignees, and from the acquiescence of the master and crew of the Mary Jane, that the dock was sufficiently deep at all times of the tide to keep the Lake from listing.

The testimony further showed, that as soon as the crew of the Mary Jane perceived the injury that was about to take place, they informed the master of the Lake, and suggested as the only means of saving the Mary Jane, "to take a purchase from the mast-head of the Lake to the wharf on the south, so that she might be eased off by the flare of her side." This the captain of the Lake refused to do, saying, "that it would be of no use." Other means were employed which proved inefficient.

It also appeared that the proximate cause of the Lake's careening over, was the banking up of the bottom of the dock at its middle, in consequence of two heavy vessels having formerly rested there, and that the consignees of the

Lake were aware of this fact, and knew that the water was insufficient for a vessel of her draught.

Emlen, for libellants. *Barnes* and *Donagan*, for respondents.

GRIER, J. — This case does not present the usual discrepancy of testimony which occasions the chief difficulty in the decisions of cases of collision. The parties seem rather to differ in the legal conclusions which ought to be drawn from the facts admitted.

[After stating the facts as above, the learned Judge proceeded.]

It cannot be pretended that the injury from this collision was caused by any fault of the libellants' vessel, or that her master or crew were in any way to blame for the result, unless we admit what the answer assumes, that they were bound to know the depth of water necessary to float the Lake, and to give her notice to keep farther off, because the dock was not deep enough to float her at low tide. But I think this assumption is entirely without foundation. The Mary Jane was fast to the wharf, and her master and crew attending to their own business in unloading her cargo. They were bound to know whether the depth of water was sufficient for their own vessel; and the master of the Lake was bound to know how much water his own vessel drew, and whether the dock would float her. Moreover, she drew into the wharf by the orders of the consignees, who were lessees of the wharf, and who did know that the water was insufficient for the draught of the Lake, and who did know that the bottom of the dock had been banked up in the middle, which is alleged to be the proximate cause of the Lake's careening over on the Mary Jane. The master of the Lake, then, was bound to know whether the dock would float his vessel, and not only so, he, under whose order he acted, (and who *pro hac vice* acted as his pilot,) did in fact know the state of the bottom, and the depth of the water in the dock, for the fact is brought to light by the very person who gave the direction.

Now the answer does not allege that there was any *vis major*, or inevitable accident which caused the injury, nor indeed was there any. But it is imputed as a culpable negligence in the libellants, that they did not give notice to the respondents of a fact of which the libellants were ignorant, and not bound to know, and which those who ordered the respondents' vessel to take that position actually

did know. Now, without insisting on the fact that the master of the Lake refused to use the only probable means of saving the Mary Jane, when informed of her situation, it seems to me, that he was to blame in not taking proper precautions both before and after he was aware of the injury likely to accrue to the libellants' vessel from the position in which he moored the Lake; and he has failed to make out a case of unavoidable accident or *vis major*, which no human skill or precaution could guard against. The *Case of the Volcano*, (3 Notes of Cases, 210; Pritchard's Adm. Dig. 129, in note,) somewhat resembles the present. The Helena, a brig of 116 tons, came to anchor in Mahomet's Bay, on the coast of Spain. The steamer Volcano ran for shelter from a gale into the same bay, where she took up an anchorage, two cable's length from the Helena, on her starboard bow, with her small bower anchor (weighing but 16 cwt.) and a chain cable only an inch and a quarter thick. About midnight a hurricane arose, and caused the Volcano to drift; the anchor broke, and though another was dropped, the Volcano, by a sudden sheer, drifted athwart the hawse of the brig; and having again come in collision with her, the brig ultimately went down. It was held, in a cause of damage, in respect of such collision, instituted by the owner of the brig, that there was a want of proper precaution in the position which the Volcano originally took up, and in not letting out more cable and a second anchor.

The precautions taken by the Volcano were amply sufficient, but for the hurricane which her commander had not foreseen, or probably could not foresee; but not having taken proper precautions against any hurricane which might possibly arise, he was held liable. Here the state of facts which caused the respondents' to come into collision with the libellants' vessel, was actually known to the person who *pro hac vice* was the commander, or under whose directions the Lake was moored; but no precaution was taken to avoid the collision which afterwards took place. Moreover, there was a refusal of the master of the Lake to use the only probable means of avoiding the injury, while yet in his power to have done so.

For these reasons, I am of opinion, that the libellants are entitled to a decree for the amount of damages incurred, to be attested by the clerk, to whom it is referred for that purpose.

Decree for libellants with costs.

The Clerk of the Court, Mr. Plitt, having afterwards reported on the amount of damages sustained, exceptions were filed on the ground that he had allowed charges for wharfage for the Mary Jane while being repaired; for the time of one of her owners, and of her crew while raising and clearing her out; and for the loss of profits to the vessel while sunk, and during her repairs.

But the Court, after argument, confirmed the Report.

Abstracts of Recent American Decisions.

New York Supreme Court, Second Judicial District, Oct. 1851.

Chief Justice MORSE, and Justices BARCULO and BROWN.

Corporation, effect of Alterations of the Charter of, upon its Contracts — Tender, when necessary. Where a contractor agreed to perform certain work upon the building of a railroad, and receive his pay therefor in the stock of the company at its par value, the stock at the time being greatly below par; *held*, that it was not competent for the contractor to rescind the contract, and claim the whole amount of its par value in money, in consequence of the company not having sought him and tendered the stock on the day of payment. The principle applicable to agreements to pay in specific articles, where the party agreeing to pay is bound to make tender, has no application, where the agreement, like the present, is an agreement to receive payment in a depreciated currency, in stocks known to be below par. The contract was made and the prices fixed with reference to the medium of payment. Nor is it always necessary for the obligor to make tender, even where the payment is made in specific articles, as where a merchant gives a due-bill payable in merchandise. In such cases the creditor must make a demand at the debtor's place of business. The place of performance of the contract is to be implied from the thing to be done. Tested by this rule, the contractor should have presented himself at the office of the company to receive the stock, where the proper books are kept, and where stockholders are furnished with the appropriate evidence of their rights.

Nor is it a valid reason for rescinding the contract, that the company subsequently procured from the Legislature an alteration of their charter, by which the stock and debts of the company were increased; the right of the Legislature to make such alteration being reserved in the original act, and it not appearing that such alteration had depreciated the value of the stock.

Nor is it a valid reason for such rescission, that the directors of such company, subsequently to the contract, determined not to pay interest upon the stock in cash, as they had formerly done; the directors having the absolute right to regulate the payment of interest as they please. Opinion by Barculo, J. — *Moore* v. *Hudson R. R. Co.*

W. Fullerton, for the plaintiff. Charles O'Connor, for the defendant.

Free School Law, Constitutionality of — Validity of Legislation submitted to the People. The Free School Law passed by the Legislature of New

York, in 1849, by its tenth and succeeding sections, provided that the electors should determine by ballot, at the ensuing election, whether the act should or not become a law; and in case a majority of the votes should be cast against it, the act was to be null and void; but if in its favor, the act was to become a law, and take effect on the 1st January following the election. The law was held to be unconstitutional, for the reasons, First, That the act in question, as it came from the Legislature, lacked the essential qualities of a valid law. It did not command nor prohibit any thing. It imposed no duty, nor was it binding on any person, nor was it the written will of the Legislature, so as to fulfil the conditions of a statute law. Its life was to depend upon the public breath inspired through the ballot-box. Second, There was no power in the Legislature to delegate or transfer the right of creating laws to the electors. By the Constitution the legislative power is vested in a Senate and Assembly, and cannot be transferred. Third, The electors had no power or right to supply the deficiencies of legislative action, and bring into life a law, which before was not a law. Opinion by Barculo, J. — *Thorne* v. *Cramer*.

James Emott, for appellant. G. Dean, for respondent.

Injunction to restrain the Violation of a Statute by a Public Officer. As a general rule, no action will be in favor of an individual to enforce a general public statute. The remedy against a public officer, for neglecting or refusing to perform his duty, is by indictment or removal. If, however, the statute be a private statute, or if being a public statute, it contains a clause giving a right of action to certain persons either by name, or by description, such persons can maintain such actions. A statute, however, which does not expressly give such an action, may do it impliedly. And where a statute gave the agent of a State prison, being a public officer, exclusive disposal of the services of the prisoners, and required him to designate their employment, the statute also for the purpose of the protection of the mechanical interests of the State, restricting the employment of the prisoners by certain specified conditions; *held*, that the agent was responsible for a violation of such conditions, in a civil action brought by a party aggrieved thereby, and that an injunction would lie to prevent a continued violation. — *Smith* v. *Lockwood, Agent of Sing Sing Prison*.

Lease, Forfeiture of — Oral Declarations of Tenant as to Landlord's Title. Where a lease which was made in 1775, for a term of 99 years, contained no express condition, nor provided for a forfeiture; *held*, in an action brought by the lessor, to obtain a forfeiture of the lease on the ground of the oral declarations of the tenant, denying the landlord's title, that such declarations cannot affect the validity of the deed; there is no principle upon which the oral declarations of the tenant as to the validity of the landlord's title, should be construed into a forfeiture of the written lease. Opinion by Barculo, J. — *De Lancey* v. *Ganun*.

Mandamus — Statutory Provisions, when repealed by the adoption of a new Constitution. There is no statutory limitation within which the writ of mandamus may be obtained. The writ being discretionary, it is competent for the Court, in the exercise of such discretion, to take into consideration any damage or inconveniences which might result from the lapse of time, should the application prevail. Where a party seeks the enforcement of a substantial right, by means of the writ, he should be allowed the time given by statute to obtain a remedy for injuries of substantially a similar character.

Where a State adopted a new Constitution, which by one of its articles provided that in all cases where private property was taken for public purposes, the damage should be assessed by a jury, or by not less than three commissioners, to be appointed by a Court of Record, as should be prescribed by law; *held*, that all previous statutes as to the mode in which

private property should be taken for public uses were repealed, even though the Legislature had not passed any law in conformity with such provisions and that the omission of legislative action did not necessarily postpone the entire operation of the provision. The direction that an act shall be done in one of two specific ways may immediately exclude any other, and such would be the appropriate construction in the absence of any qualifying language, although the selection of either alternative might be devolved upon another. The Court in this case effects the change *proprio vigore*. It is merely left to the secondary power to carry out the details. Opinion per STRONG, J., at the special term in Westchester County, February, 1852. — *The People ex rel. Olmstead* v. *The Board of Supervisors of Westchester County.*

J. W. Tompkins, for the relator. R. H. Coles, for the defendants.

Right of taking private Property for public use — Authority strictly construed — Injunction to restrain Municipal Corporation from enforcing invalid Assessment. Where, under the amended charter of the city of Brooklyn, power was given to the common council, among other things, to "cause public squares and parks to be opened, regulated, ornamented, and protected," but no specific provision was made for the assessment and collection of the expenses of such improvement; but after providing for the assessment and collection in cases of opening and improving streets, and opening parks, there was a general section which enacted, that the expense of constructing wells, pumps, cisterns, lamp-posts, &c., &c., *and all other improvements of a like nature* not before specified, should be apportioned and assessed by the street commissioner. *Held*, that the assessment in question for the improvement and protection of a public park, involving a large expense, was not embraced within the provisions of such section, it not being "an improvement of a like nature," and was therefore invalid.

The power of taking property of individuals for public use, is one of questionable validity, and the authority for which, must be strictly construed.

Where an assessment is clearly invalid, an injunction to restrain the corporation from enforcing it, is proper, even though the persons assessed have a legal remedy. (Story, Comm. on Eq. Jur. § 959.) Opinion by Barculo, J. — *Bouton* v. *The City of Brooklyn.*

A. Crist, for the plaintiff. J. M. Van Cott, for the defendant.

Tender — Formalities, when waived — Stipulated Damages. The formalities of a tender may be waived under certain circumstances, as by express words spoken at the time, such as a direction not to produce the money, or language amounting to a refusal to receive it; the omission of the vendor to attend at the time and place appointed for the consummation of the contract; his inability to comply with the conditions on his part to be performed.

A party contracting for the sale of real estate, who suffers the subject of the contract to be charged with incumbrances of his own creation, or to remain charged with those created by others, in breach of his covenant to assure a good title, as fully and effectually waives and relieves the covenanter from the actual production and offer of the purchase-money, as he could do by the use of express words, or by any other means within his power; where he has no title, or a defective one, when the conveyance is to be made, any condition or precedent, such as tendering, paying or securing the purchase-money, need not be fulfilled.

Where the damages from a breach of a contract are uncertain in their nature, and depend upon considerations which none can comprehend, as well as the parties themselves, the stipulated damages will be regarded as the true measure of recovery. Opinion per Brown, J. — *Holmes* v. *Holmes.*

Same District, Poughkeepsie, Jan. 1852.

Ejectment—Conditions subsequent in a Deed — What is a Waiver. Plaintiff, in 1841, deeded certain premises in fee, to the defendants, for the purpose of the extension of their railroad as directed in the several acts of the Legislature relative thereto, with a condition that the conveyance should be void unless the road was completed through the premises, by the 1st of January, 1843. The deed also contained a covenant on the part of the defendants, to maintain suitable division fences. The company entered on the land, but did not complete the road through it until 1844. The plaintiff had witnessed the construction of the road without objection, or any notice of his intention to insist upon the breach of the condition. He had travelled over it since its completion, and had given notice within a year to the company to perform its contract in regard to the division fences, which had been done by them. The action was not commenced until nearly three years after the breach; *held*, that the breach did not *ipso facto* determine the estate. It only exposed it to be determined at the election of the grantor, to be signified by an act equivalent to a re-entry at common law. *Held*, that plaintiff by his acts had waived the forfeiture and confirmed the grant.—*Ludlow* v. *The Harlem Railroad Co.*

First Judicial District, December, 1851.

Presiding Justice EDMONDS, and Justices EDWARDS, MITCHELL and KING.

Action in Tort, when assignable. Although an action for a wrong connected with the person be not assignable, yet when connected with property affecting its value, it is assignable, and, under the code, the action for it may be brought in the name of the assignor.

NOTE. — This case arose under that section of the code of procedure, which provides "that *every* action shall be prosecuted in the name of the real party in interest."— *Zabriskie* v. *Sayre.*

Attachment, one of two Joint Debtors liable to — When Statute of Limitations begins to run in case of Factors. Where one of two joint debtors is a non-resident he may be proceeded against as such, by warrant of attachment under the Revised Statutes.

Where goods are left with a factor to sell on commission, the owner has no cause of action for the value of the goods, until a demand by him, and the statute of limitations does not begin to run until such demand has been made. Opinion per Mitchell, J. — *Walker et al.* v. *Baird.*

Wightman and Clark, for plaintiff. W. Crafts, for defendant.

Attachment, Warrant of against concealed Debtor — Form of Warrant — Contracts for the sale of Stock — When action will lie. The defendant was a stock broker, doing business in Wall Street, and residing in Twenty-ninth Street, New York. On the 29th January, plaintiff delivered to him a large amount of stock under a previous contract to deliver on that day, cash payable on delivery. The stock was delivered without the cash being received at the time of delivery, but in place thereof the defendant's checks, which were dishonored. At a later hour in the day, after such delivery, the defendant was missing, and under such circumstances as justified the belief that he had absconded or concealed himself. A warrant of attachment was obtained, and issued against his property, at the instance of the plaintiff, in an action to recover the contract price of the stock. The warrant was issued simply under the signature of the Judge, there being no seal of the Court, nor indorsement of the attorneys' names. *Held*, on motion to set aside the warrant on the ground of the immaturity of the

debt, and the defective form of the warrant, that the contract price of the stock was payable on the delivery, and that the delivery without payment was not a waiver of the right of instant action; the defendant had not the entire day for the performance of the contract on his part, as in the case of a note payable on a particular day. *Held*, also, that the taking of a check for the stock, which on presentation was found not to be good, was a mere nullity, and did not suspend the plaintiff's right of action until the following day. The form of the warrant under the code of procedure was valid. —(Code sec. 228.) — *Genin* v. *Tompkins*.

Common Carrier — Liability for Delay in Transportation of Goods. In an action on the case brought against a common carrier, to recover damages for delay in the delivery of goods; *held*, that it was competent for the carrier to show that he had exercised due care and diligence to guard against delay, and that it was a question of fact for the jury, whether such care and diligence had been exercised. Had the action been founded in assumpsit, upon the express condition contained in the contract to deliver without delay, it might have been a question, whether, inasmuch as the undertaking was absolute, and contained no provision as to any ulterior circumstances beyond the defendant's control, he was not bound to perform it at all events. Opinion per Edwards, J. — *Dows et al.* v. *Cobb*.

H. S. Dodge, for the plaintiff. E. Sandford, for the defendant.

Contract of Loan, not affected by the mere Knowledge of the intended fraudulent Act of one of the Parties. Where a Bank in New Jersey discounted a note, and upon such discount paid to the borrower bills of a less denomination than five dollars, whose circulation was prohibited by the laws of the State of New York, although valid in New Jersey, the Bank at the time knowing that the borrower intended to use the bills in the State of New York, it not appearing that it was a part of the contract of loan, that the borrower should receive such bills; *held*, that the mere knowledge of the purpose for which the bills were to be used, did not vitiate the securities taken by the bank upon such discount. Opinions by Justices Edmonds and Edwards. — *Merchants Bank* v. *Spalding*.

B. W. Bonney, for the plaintiff. J. L. Curtenius, for the defendant.

Corporations, Proceedings against Insolvent to wind up their Affairs. A proceeding by a judgment and execution creditor against an insolvent corporation, to wind up its affairs, and distribute its assets among its creditors under one part of the Revised Statutes, concerning "Proceedings against corporations in Equity," is no bar to proceedings by a creditor at large under another part of the same statute, but it is discretionary with the Court to confine the proceedings to one suit, and such power will not be exercised in favor of a suit which is not brought for all the creditors. Opinion per Edmonds, P. J. — *Dumham* v. *The Empire Mills*.

B. F. Butler, for the plaintiff. Ward Hunt, for the defendant.

Evidence, Competency of one Defendant as a Witness for his co-defendant, in actions of Tort. In an action for tort, where separate judgments may be given as to several defendants, one of the defendants may be examined as a witness for his co-defendant, it being easy in such case to prevent his testimony being used in his own favor, and he having no interest in the event, except against the party using him as a witness. Opinion per Edmonds, J. — *Dord & Rowe* v. *Holman*.

Nash, for plaintiff. Barrett and Barber, for defendant.

NOTE. — This case arose under the section of the code of procedure recently adopted in New York, by which it is provided, that "A party may be examined on behalf of his co-plaintiff or co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, as to which a separate and not joint judgment shall be rendered,

But the examination thus taken shall not be used in behalf of the party examined, unless he is examined at the instance of the adverse party." — Section 397.

Factor and Principal. — Where goods have been left with a factor, with general authority to sell, and he has made advances on them, and the time for the repayment of the advances has elapsed, and he thereupon seeks to reimburse himself, he is not liable in an action as for a wrong for converting the property, but only for the surplus of the avails of the sale after paying his advances. — *Blairs* v. *Osborns*.

Indictment for Perjury — Material Variances between Indictment and Proof. An indictment charged S., the prisoner, with perjury upon an examination where he had been previously sworn to answer questions truly, which charge was attempted to be supported by evidence, that he falsely swore that the contents of an affidavit produced by him were true.

The indictment further charged the prisoner with perjury, on his examination as surety for one I., committed on the complaint of M., in default of $500 bail. The charge was attempted to be supported by evidence that he falsely swore upon his examination as surety for I., committed on the complaint of another party, in default of $3000 bail; *held*, that the variances were material, and the prisoner having been convicted at the sessions, the conviction was reversed. — *Smith, plaintiff in error*, v. *The People*.

Judgment, Invalidity of, rendered at Chambers. It is not competent for a Judge at Chambers, or any where out of Court, to render judgment, except in the single case of motions to strike out pleadings as frivolous. In all other cases, judgment can only be rendered in Court. — *Aymar* v. *Chase*.

Jurors, Challenge for principal Cause — Challenge to the Favor — What is a sufficient Challenge to the Favor. In a capital case, after a juror has been challenged for principal cause, and the challenge tried and disallowed, he may be challenged to the favor, and it is a sufficient challenge to the favor, without assigning other cause than the words of the challenge import.

The rule that all causes of challenge shall be taken together, means that all causes of principal challenge must be taken together, and be tried at the same time; and so of challenges to the favor. In other words, that after one trial, no fresh cause of challenge of the same nature can be urged, unless arising subsequently to trial. Opinion per King, J. — *Henry Carnal, plaintiff in error*, v. *The People*.

H. L. Clinton and A. L. Jordan, for plaintiff. District Attorney, for the people.

Note. — The plaintiff in error was convicted of murder at the New York Oyer and Terminer, and sentenced to death. Before the day of execution, a bill of exceptions having been signed and sealed, a writ of error was allowed by Justice Harris of the Supreme Court, with a clause therein directing a stay of proceedings on the judgment. Considerable doubt having been expressed as to the authority of any one to stay the execution of the sentence, except the Governor, by virtue of his constitutional power, and the sheriff, in certain cases specified in the statute, a motion was made at the general term of the Supreme Court in October, 1851, to quash the writ of error, or vacate the stay of proceedings. The plaintiff in error having been brought before the Court by writ of habeas corpus, the argument was had, and subsequently the decision of the Court pronounced, refusing to quash the writ of error, or vacate the stay of proceedings, holding that it was competent for a Justice of the Supreme Court to allow a writ of error in a capital case, and that such allowance necessarily operated as a stay of proceedings. The argument on the writ of error was sub-

sequently proceeded with, and a new trial ordered on the grounds stated in the abstract, the rulings of the Justice presiding at the trial of the prisoner having been at variance with the law as there laid down.

Landlord and Tenant — Summary Proceedings to remove latter for non-payment of Rent. One who is neither tenant nor under-tenant of a landlord, and does not claim under him, cannot be removed by summary proceedings under the statute.

Where a lease is made by two persons, they are jointly liable for the payment of rent. Each is liable for the whole, and a demand therefore upon one is sufficient to authorize proceedings under the statute against both. The fact that the landlord has taken security for his rent, does not deprive him of the right to resort to summary proceedings. Opinion per Mitchell, J. — *Acorta* v. *Greisler et al.*

E. Terry, for the plaintiff. J. M. Martin, for the defendants.

Lease—Parol Assignment of a Lease, when sufficient to make the Assignees responsible to the Landlord. Where defendants went into possession of premises seized of all the estate of the original lessees, and for the whole term, they are liable to the landlord as assignees of the term though no assignment in writing be proved. "Where the action is against the defendant as assignee of a term, and the issue on the assignment, it will be enough for the plaintiff to give general evidence from which an assignment may be inferred, as that the defendant is in possession, or has paid rent; the defendant may show that he is not assignee, but only under-tenant to the lessee."— (9 Cow. Sup. Court Rep. 88).—*Carter* v. *Hammett.*

Non-Imprisonment Act— When Warrant of Arrest may issue before Judgment. Under the Act of 1831, (See Laws of New York, 1831,) abolishing imprisonment for debt, and for punishing fraudulent debtors, a warrant may issue against a debtor for fraudulently concealing his property, at the instance of a creditor who has brought a suit only and not yet obtained judgment. — *The People ex rel. Morris* v. *Platt.*

Partnerships Limited, when dissolved — Special Partner, when liable as a General Partner. Where a limited partnership is dissolved by mutual consent, before the time fixed for its termination by the original certificate, the dissolution does not take effect as to creditors or dealers, until the expiration of the notice of dissolution, which is required to be given by the statute. And where, on the dissolution, and before the expiration of such notice, the special partner takes an assignment of, or security upon the partnership effects for the amount contributed by him to the partnership, he becomes a general partner, and is liable to creditors as such. This is in effect a withdrawal of the capital contributed by him, and is an "alteration of the capital" of the partnership, within the meaning of section 12 of 2 R. S. 3d ed. p. 50. Opinion per King, J. — *Beers* v. *Reynolds et al.*

J. Center, for plaintiff. L. F. Bowen, for defendant.

Pleading —Demurrer to Declaration against Executors upon a continuing Contract with Testator. Where a continuing contract for services has been made, and one of the parties dies pending its execution, but it is carried on to completion by his executors, it is competent to declare upon the contract as upon a consideration springing from the testator, and on promises by the executors. Opinion per Mitchell, J. — *Taylor, Ex'r,* v. *Benjamin.*

W. M. Evartt, for defendants. C. T. Cromwell, for plaintiff.

Promissory Note — What constitutes a bonâ fide Holder for Value — When subject to Equities existing between original Parties. A creditor who takes from his debtor a note of a third person in payment of his debts, but relinquishes no security, and holds even his original debtor's liability, is not a *bonâ fide* holder of the note, though passed to him before

maturity, but holds it subject to all the equities existing between the original parties. Opinion by Edmonds, P. J. — *Spear et al* v. *Myers.*

S. P. Nash, for plaintiff. C. F. Southmayd, for defendant.

Reference, order granting a, not appealable. In a case, which is referable by the statute, the order of the special term granting or refusing a reference on the ground of a long account is not appealable. — *Gray* v. *Fox.*

Surrogate, Inability of, to grant Letters of Administration in certain cases. Where the decree of a surrogate refusing to admit a will to probate, has been appealed from, it is not competent for the surrogate pending the appeal to grant letters of administration, as in case of intestacy. He can only appoint a collector *ad interim.* Opinion per Mitchell, J. — *Hicks* v. *Hicks.*

Charles O'Connor, for appellant. M. S. Bidwell for respondents.

Vested Rights, how affected by Law of 1848, *for the protection of Property of Married Women.* Where a husband before the passage of the Act entitled "An Act for the more effectual protection of the property of married women," (See Laws of 1848,) had instituted legal proceedings to reduce into his possession a legacy to his wife; *held*, that the statute did not affect his right because it had already vested, and he may recover in his own name. As far as the statute in question professes to affect the rights of property already vested, it is unconstitutional and void. Opinion per Edmonds, J. — *Westerneth* v. *Gregg.*

A. L. Jordan, for appellant. L. Livingston, for respondent.

[Decisions under the new Practice Act of Massachusetts.]

Supreme Judicial Court, Suffolk, ss., March 18th.

Opinions by Chief Justice Shaw.

Entry of an Action after the Time limited by the Statute, not permitted even by consent of Parties. This was a motion to enter a writ in this Court, under the following circumstances: The writ was returnable to this Court on the first Monday of March. It was not entered on that day nor on the next day, according to sec. 13, ch. 233, 1851. There was an affidavit filed in the case, setting forth that the case was not entered through inadvertence, and an agreement signed by the attorneys, that it should be entered on a subsequent day. The Court said that sec. 13 was to be taken in connection with the close of sec. 9, which provides that writs shall be returnable on the return days therein named, and the return days under the old law are no longer such.

The question here is, whether the writ by non-entry did not become a nullity. The only doubt is whether the consent of the parties might not make it good. But the provision is express. If not entered on the next day after the return day, by the plaintiff, the other party has the right to enter it for his costs. Under the old law, the writ being returnable to the term of the Court, which was considered as continuing more than a day, the Court might allow it to be entered at any time by consent. There is the difficulty of limiting the time within which the entry might be allowed, if once it has passed the time prescribed. If the writ be *functus officio* there is nothing before the Court on which it can act, even if the writ were allowed to be entered. A similar and very well considered case was that of *Bell* v *Austin*, (13 Pick. 90.) In that case the plaintiff in error was summoned to appear at the Court of Common Pleas on the first Tuesday of April, when, in fact, the term was by law to be holden on the fifth Tuesday of March. The Common Pleas allowed the writ to be amended

by inserting the proper day, and judgment was entered against the defendant by default. It was held that the judgment was erroneous; for if the writ had not been amended, the defendant was summoned to appear at a time when the Court did not sit; and the amendment being allowed, there was a contradiction of the return by the amendment, and the defendant, not being properly before the Court by proper service of the original process, was not bound by the judgment of the Court.

We think that the writ cannot be entered at any time subsequent to that prescribed by the statute, even by consent of parties. — *J. Kidder* v. *C. W. Brown.*

Action carried by Affidavit from the Common Pleas to the Supreme Court, when to be entered in the Supreme Court. This was a motion to enter in this Court an action brought in the Court of Common Pleas, upon a demand for $600, in which the writ was made returnable to that Court on the first Monday of February. The affidavit and answer were filed at the proper time. On the second of March, which was the first Tuesday, and the day on which the present term of this Court commenced, the action was removed to this Court upon the defendant's affidavit under the provisions of the statute of 1840, — that the defendant shall, at the first term of the Court, apply to have such action (in case he elect to remove) removed, and upon such application, the Court of Common Pleas shall proceed no further in the cause, but the same shall be removed to, and be heard and determined by the Supreme Judicial Court; and the party so applying shall enter said action therein at the next term thereof for the same county. In this case, the action was entered on the first Monday of February; the defendant appeared and filed his answer. There was no first term of the Court of Common Pleas after the entry of this action and before its removal to this Court. The Court give no opinion whether it was rightly removed. Express directions are given by the statute to the clerk, and he is only a ministerial officer. He is only to remove the original papers from the Court of Common Pleas and to file them in this Court.

Suppose the case were rightly removed, then it is to be entered at the next term of the Court. Is this the next term? The action was removed on the second day of March, which was the first Tuesday and the day of the sitting of this Court. The next term must be construed to mean the November term. There are no cases in point, but a plenty of analogies, as in cases of submission of an award before a Justice of the Peace. So also in capital cases, in which the indictment is to be transmitted to this Court, to be entered at the next term thereof. In a recent case in Middlesex, the Court of Common Pleas sat on Monday, and the Supreme Judicial Court on Tuesday, an indictment for a capital crime was found in the Common Pleas on Wednesday. Circumstances made it desirable that the indictment should be entered at the term of this Court then in session; but the Court held it must be entered at the term held next after the finding of the indictment, and that it could not take jurisdiction at that term.

The motion to enter the case at this term must be denied, and it must stand till the November term. — *John A. French* v. *John M. Barnard.*

Court of Common Pleas for Bristol, March Term.

Before WELLS, Chief Justice.

Affidavit of Merits by one of several Defendants. In this case the Court held, that where there are several defendants to the same suit, an affidavit of merits, under section 14, made by only *one* defendant, but which

averred a defence to the entire action, was a sufficient compliance with the statute; and no defendant could be defaulted —*Fall River Union Bank* v. *Thomas J. Coggshall et al*

Battelle & Williams, for plaintiff. H. G. O. Colby, for defendant.

Affidavit of Merits can be made only by Defendant. This suit was commenced by an arrest of the defendant, and G. Lincoln became his bail, and the defendant left the Commonwealth before the action was entered. Within fifteen days after the entry of the action, the defendant's bail filed his own affidavit of merits to the action, subscribing it *Henry Stevens*, by G. Lincoln. The Court held that none but the defendant in person could make the affidavit under the statute, but continued the cause to await the action of the Legislature.—*Brinton* v. *Stevens.*

Adam Mackie, for plaintiff. T. G. Coffin, for defendant.

Interrogatories — Irresponsive Answers. In an action of assumpsit for the board of the defendant, the plaintiff having interrogated the defendant whether he boarded at any time with the plaintiff, which the defendant had answered in the affirmative, the second interrogatory was, "What price, if any, was agreed upon for your board?" The answer was, "No price was agreed upon when I commenced. *When I left, I settled with him, and paid ten dollars a month for the whole time.*" The words in italics were ordered to be struck out, as not responsive to the question.—*Conaty* v. *Conaty.*

Bennett & Williams, for the plaintiff. N. Morton, for the defendant.

Miscellaneous Intelligence.

EVIDENCE OF PARTIES IN ENGLAND. — *Welch* v. *Fawcett.* — This case was tried in the Exchequer Feb. 25, before the Chief Baron and a special jury. It was an action by an architect of celebrity, to recover his commissions for plans and preliminary trouble in regard to certain proposed buildings, which eventually were not erected. The defendant was a gentleman of property who had proposed to erect the building, and had employed the plaintiff. The plaintiff and the defendant were both examined, as well as other witnesses, and at the conclusion of the reply for the plaintiff, "The Chief Baron left it to the jury to decide between the parties. In so doing, his Lordship took occasion to remark, that the admission of parties to the witness-box seemed to him to be the logical and necessary consequence of the previous alterations in the law of evidence; and while it might be admitted to have been both necessary and proper, it certainly rendered the duty of a juryman more difficult, for the parties were diametrically opposed to each other in their recollection and construction of facts. The change also necessarily led to increased litigation, for where new witnesses and means of proof were introduced, new actions must spring up; and cases were brought into Court which but for the new law would never have been thought of. Without saying that this was such a case, it was clear that the jury had a difficult task before them when called upon to decide between the plaintiff and the defendant, and he would add, that as the result of his experience of the working of this act, he had come to the opinion that it would be highly desirable, if not absolutely necessary, that a further change in the law should be made, by extending the operation of the Statute of Frauds, now limited to contracts to the value of £10, to every species of contract, so that all parties should be compelled to reduce their

transactions into writing, about which there could not afterwards arise any question."

THE CANAL ENLARGEMENT IN NEW YORK. — Mr. Justice Brown, of the Supreme Court of New York, has given an opinion in the matter of the canal enlargement. The defendant to a suit upon a note, pleaded that it was given in purchase of a canal revenue certificate, and was therefore without consideration, and void. Judge Brown said — "I am of opinion that all the material provisions of the act to provide for the completion of the Erie Canal Enlargement and the Genesee Valley and Black River Canals, passed July 10, 1851, are in conflict with the Constitution, and therefore void The only equivalent given for the promissory note which the plaintiff seeks to recover, was a canal revenue certificate for the sum of $500, made and issued in conformity with the Act. The certificate has no real or actual value, and never had. The note is therefore without consideration, and payment cannot be enforced. Judgment is given for defendant upon the demurrer; the plaintiff to withdraw it and reply to the answer within twenty days, on payment of costs."

THE STATE TREASURER OF NEW YORK. — A case has been recently tried before Mr. Justice Gray, of the Supreme Court of New York, and a jury, to settle whether Mr. Welch or Mr. Cook was the rightful Treasurer of the State. Mr. Cook had been sworn into office, and Mr. Welch brought this action to test the validity of the election. The panel consisted of six whigs and six democrats; and as there were five points involved, this equal division of the jury in politics bids fair to promise a disagreement. This difficulty was cured by the Court, who decided that there were no questions of fact to be determined, and instructed the jury to find a verdict for the plaintiff. Exceptions were taken by the defendant, which the Court ordered to be heard at the next General Term. The questions involved were, whether certain votes in certain districts were properly rejected, or whether they should have been counted — the facts as to the reasons for the rejection in the different districts being different.

*** The Table of Cases and Index have taken up so much room, that we have been unexpectedly obliged to omit many articles in type.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, David	Lynn,	Feb. 13,	John G. King.
Alexander, Oliver	Brighton,	" 17,	Asa F. Lawrence.
Allen, Elijah C. *et al.*	Conway,	" 14,	D. W. Alvord
Baker, George S.	Lee,	" 14,	Jonathan E. Field.
Baker, Isaac	Erving,	" 21,	D. W. Alvord.
Baker, Theodore *et al.*	Brookline,	" 19,	John M. Williams.
Batcheller, Benj. L. *et al.*	Worcester,	" 24,	Henry Chapin.
Bates, Joseph N.	Barre,	" 27,	Charles Brimblecom.
Blackmer, Lewis	North Brookfield,	" 7,	Henry Chapin.
Blanchard, William	Roxbury,	" 13,	Francis Hilliard.
Bradley, Samuel P. *et al.*	Haverhill,	" 21,	John G. King.
Bradstreet, William	Waltham,	" 6,	Bradford Russell
Bragdon, William	Charlestown,	" 12,	Asa F. Lawrence.
Brown, George A.	Watertown,	" 16,	Asa F. Lawrence.
Brown, John L.	Buckland,	" 12,	D. W. Alvord.
Bugbee, Samuel C.	Boston,	" 27,	Frederic H. Allen.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Burr, Heman M. Jr. *et al.*	Boston,	Feb. 13,	Frederic H Allen.
Carpenter, Albert	Attleborough,	" 2,	E. P. Hathaway.
Carpenter, Samuel	Attleborough,	" 2,	E. P. Hathaway.
Chapin, Aaron	Great Barrington,	" 20,	J. E. Field.
Chapin, Gamaliel	Warwick,	" 27,	D. W. Alvord.
Clarke, George W.	Lowell,	" 10,	S. P. Adams.
Cobb, Joseph	Orange,	" 17,	D. W. Alvord.
Cobleigh, Benjamin F.	Watertown,	" 26,	Asa F. Lawrence
Crosby William S.	Dedham,	" 25,	Francis Hilliard.
Danforth, Martin G.	Winchester,	" 5,	Bradford Russell.
Davis, Asahel *et al.*	Harvard,	" 9,	Charles Mason.
Dickinson, Gardner *et al.*	Conway,	" 14,	D. W. Alvord.
Eames, Charles A.	Upton,	" 24,	Henry Chapin.
Edmands, Josephus S.	Cambridge,	" 22,	Asa F. Lawrence.
Emerson, Ellis B.	Franklin,	" 3,	Francis Hilliard.
Enderton, Joseph	Hadley,	" 23,	Haynes H. Chilson.
Everett, Addison	Middlefield,	" 16,	Haynes H. Chilson.
Farrar, John P. *et al.*	Boston,	" 19,	John M. Williams.
Field, Horatio W.	Taunton,	" 24,	E. P. Hathaway.
Flemming, Reuben	Wendell,	" 21,	D. W. Alvord.
Forbush, Isaac	Westborough,	" 24,	Henry Chapin
Gault, William	Boston,	" 5,	Frederic H. Allen.
Golding, Robert P.	Boston,	" 26,	Frederic H. Allen.
Grover, Andrew	Abington,	" 12,	Welcome Young.
Hatch, Windsor	Boston,	" 13,	Frederic H. Allen.
Holbrook, Caleb	Pawtucket,	" 26,	E. P. Hathaway.
Houston, Chester F.	Conway,	" 13,	D. W. Alvord.
Howard, Henry D. *et al.*	Grafton,	" 24,	Henry Chapin.
Huse, William E.	Clinton,	" 3,	Henry Chapin.
Johnson, James G *et al.*	Boston,	" 13,	Frederic H. Allen.
Josselyn, John H. Jr.	Roxbury,	" 17,	Francis Hilliard.
Kempton, Edmund	Blackstone,	" 27,	Thomas Kinnicut, J. P.
Lilley, Wilkins	Lowell,	" 3,	S. P. Adams.
Locke, George E.	Lowell,	" 21,	S. P. Adams.
Longley, Augustus H.	Belchertown,	" 16,	Myron Lawrence.
Look, Melvin	Northampton,	" 12,	Haynes H. Chilson.
March, Henry	Worcester,	" 25,	Henry Chapin.
Marshall, John B.	Lowell,	" 21,	S. P. Adams.
Mechanics Manuf Co.	Attleborough,	" 2,	E P. Hathaway.
Moody, John H *et al.*	Lowell,	" 20,	Bradford Russell.
Morrill, Benj. D.	Boston,	" 12,	Frederic H. Allen.
Munroe, James W.	Winchendon,	" 27,	Charles Mason.
Nason, Joseph *et al.*	Boston,	" 18,	John M. Williams.
Nelson, Daniel	Rowe,	" 25,	D W. Alvord.
Payson, James G.	Boston,	" 6,	John M. Williams.
Pike, Charles S.	Boston,	" 7,	Frederic H. Allen.
Pike, Charles S.	Boston,	" 9,	John M. Williams.
Randall, Francis A.	Leominster,	" 27,	Charles Mason.
Reed, Moses M.	Winchendon,	" 27,	Charles Mason.
Rice, Abner *et al.*	Framingham,	" 24,	Henry Chapin.
Roundey, William C. *et al.*	Lowell,	" 9,	Charles Mason.
Sampson, Joseph A.	Boston,	" 5,	John M. Williams.
Scott, E. W. *et al.*	Lowell,	" 20,	Bradford Russell.
Shepard, Anson *et al.*	Conway,	" 14,	D. W. Alvord.
Sibley, William B.	Oakham,	" 9,	Charles Brimblecom.
Staples, Elias	Taunton,	" 16,	E. P. Hathaway.
Stockbridge, Chas. D. *et al.*	Whately,	" 14,	D. W. Alvord.
Stone, Richard C.	Sherburne,	" 3,	Asa F. Lawrence.
Sullivan James P. *et al.*	Sherburne,	" 14,	D W. Alvord.
Swain, Alfred W.	Lynn,	" 4,	John G. King.
Thomas, Isaiah	Washington,	" 28,	J. E. Field.
Tucker, John E.	Ware,	" 6,	Haynes H Chilson.
Tyler, Moses K. *et al.*	Haverhill,	" 24,	John G King.
Upton, Calvin	Danvers,	" 21,	John G. King.
Vinton, Abial	Southbridge,	" 9,	Henry Chapin.
Walworth, James J. *et al.*	Boston,	" 18,	John M. Williams.
Waterman, Benjamin	Douglass,	" 18,	Henry Chapin.
Watson, Shepard	Lowell,	" 19,	S. P. Adams.
Way, George	Williamsburg,	" 17,	Haynes H. Chilson.
Whitcomb, Jonas *et al.*	Hubbardston,	" 18,	Charles Mason.
Whitcomb, Lysander *et al.*	Hubbardston,	" 18,	Charles Mason.
Whitman, Ebenezer W.	South Reading,	" 16,	Bradford Russell.
Wood, Merritt D.	Worcester,	" 14,	Henry Chapin.
Woodin, Solomon, Jr.	Great Barrington,	" 24,	J. E. Field.